UNITED STATES BANKRUPTCY COURT

DISTRICT OF HAWAII

In re	)	Case No. 97-03746
	)	Chapter 11
UPLAND PARTNERS,	)	
	)	
Debtor.	)	
_____	)	Re: Docket No. 2693

MEMORANDUM DECISION REGARDING P.F. THREE PARTNERS' MOTION FOR RECONSIDERATION OF SETTLEMENT BETWEEN TRUSTEE AND RICHARD FERGUSON

On December 15, 2003, P.F. Three Partners, an unsecured creditor, filed a Motion for Reconsideration of Order Granting Motion for Approval of a Compromise Settlement of Richard Ferguson's Claims Against the Debtor, Entered December 3, 2003.

Like nearly every other issue in this chapter 11 case, the background of the motion is unnecessarily complicated.

Richard B. Ferguson was involved in the debtor's real estate development project from 1978 to 1994. On June 12, 1998, he filed Proof of Claim No. 22. The claim was in excess of $918,000, largely for services allegedly rendered. On September 16, 1999, the court entered an order (docket no. 612) which disallowed all but $100,000 of Claim No. 22. Mr. Ellis moved for reconsideration of that order. By order filed on October 26, 2000 (docket no.

1119), the court disallowed Claim No. 22 in its entirety.

While Mr. Ellis' motion for reconsideration of Claim No. 22 was pending, on March 24, 2000, Mr. Ferguson filed Proof of Claim No. 41, which he described as an amendment of Claim No. 22. Claim No. 41 states a claim for $638,000, again largely for services rendered. By order filed on October 26, 2000 (docket no. 1120), the court disallowed all of Claim No. 41 except for a claim for compensation, on a quantum meruit basis, for services rendered in 1991, 1992, and 1994.

The court ruled that an evidentiary hearing was necessary to adjudicate the quantum meruit claim. The evidentiary hearing was originally scheduled for February 26, 2001. It was continued several times for various reasons. Eventually, the hearing was set for July 21, 2003, but it had to be continued again to September 8, 2003, because all of the parties had forgotten about the hearing and were unprepared.

Before the September 8 hearing, the Trustee and Mr. Ferguson reached a settlement. The settlement provides that the Trustee will pay Mr. Ferguson $50,000.00, concurrently with the distribution to other unsecured creditors, in satisfaction of all of Mr. Ferguson's claims against the estate. The Trustee moved for approval of the settlement on September 4, 2003 (docket no.

2573). Mr. Ellis and P.F. Three Partners objected to the settlement (docket nos. 2598 and 2626). Mr. Ellis later withdrew his objection to the settlement and to Mr. Ferguson's claim as settled (docket nos. 2648 and 2649). The court approved the settlement by order entered on December 3, 2003 (docket no. 2684). P.F. Three Partners now seeks reconsideration of that order. The motion for reconsideration adds nothing whatsoever to its original objection to the settlement and provides no basis for relief under Fed. R. Bankr. P. 9023 or 9024.

"The purpose of a compromise agreement is to allow the trustee and the creditors to avoid the expenses and burdens associated with litigating sharply contested and dubious claims." In re A&C Properties, 784 F.2d 1377, 1380-81 (9th Cir. 1986). A settlement should be approved only if it is "reasonable, given the particular circumstances of the case." Id. at 1381.

> In determining the fairness, reasonableness and adequacy of a proposed settlement agreement, the court must consider:
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> > (a) The probability of success in the litigation; (b) the difficulties, if any to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expenses, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises.

Id. (quoting In re Flight Trans. Corp. Sec. Litig., 730 F.2d 1128, 1135 (8th Cir.

1984)). In considering these factors, the "responsibility of the bankruptcy judge . . . is not to decide the numerous questions of law and fact raised by [the parties objecting to a settlement] but rather the canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness'." In re W.T. Grant Co., 699 F.2d 599, 608 (2d Cir. 1983), cert. denied sub nom. Cosoff v. Rodman, 464 U.S. 822 (1983), quoting Newman v. Stein, 464 F.2d 689, 693 (2d Cir.), cert. denied sub nom. Benson v. Newman, 409 U.S. 1039(1972).

The settlement which the Trustee negotiated with Mr. Ferguson falls well within the range of reasonableness. Each applicable criterion was met.

Probability of success. P.F. Three Partners relies upon the Trustee's trial brief, which argued that Mr. Ferguson could not have carried his burden of proving his entitlement to compensation on a quantum meruit basis. P.F. Three Partners argues that:

> The Court had already concluded that no additional discovery or evidence could be taken. As such, Ferguson was limited to the Schedules that he submitted with his claim form and his own testimony. These would have been insufficient to meet Ferguson's burden of proof, and the matter would have speedily and finally concluded at the evidentiary hearing.

Almost every statement in this paragraph is wrong.

First, the court never "concluded that no additional . . . evidence could

be taken." It is true that, when the court continued the evidentiary hearing for the last time, the discovery cutoff had already passed and the court did not extend it. There is no basis, however, for the assertion that the court limited Mr. Ferguson's ability to offer evidence at the hearing.

Second, P.F. Three Partners fails to explain why Mr. Ferguson's testimony could not have been sufficient to carry his burden of proof. Although the Trustee argued (in a single sentence in his trial brief) that Mr. Ferguson had to produce expert testimony concerning the value of his services, neither the Trustee nor P.F. Three Partners offered any authority for this proposition.

Third, if Mr. Ferguson had met his initial burden of coming forward with a prima facie case, the objectors would have had to respond. The only evidence which the Trustee or anyone else ever identified to rebut Mr. Ferguson's testimony was the testimony of Mr. Ellis. Mr. Ellis' credibility is questionable. This court previously disallowed certain claims filed by Mr. Ellis after it came to light that Mr. Ellis had altered the promissory notes on which the claims were based by removing language of rescission written on them. See Findings of Fact and Conclusions of Law filed in Adv. No. 99-0081 on September 13, 2000, at paragraph 11. (Mr. Ellis never appealed this order.) This incident is highly relevant to the credibility of Mr. Ellis. His testimony might not have been

sufficient to refute Mr. Ferguson's case.

Fourth, there can be no assurance that the evidentiary hearing would have "finally" resolved Mr. Ferguson's claims. The allowance or disallowance of a claim is always subject to reconsideration for cause. 11 U.S.C. § 502(j), Fed. R. Bankr. P. 3008.[1] There is no specific time limit for making such a request. As a consequence, an order disallowing a claim is almost always less "final" (at least until there are no assets left with which to pay the reconsidered claim) than an order approving a settlement.

Difficulties of collection. Because this settlement pertains to a claim against the estate, this factor is not applicable.

Complexity of litigation. Complexity, expense, and delay are relative concepts. Although the parties anticipated that the evidentiary hearing would be concluded in one day, the dispute was not simple. The allowance of Mr. Ferguson's claim would have depended on a determination of the nature and value of personal services he allegedly rendered over a period of years ending a decade ago. Virtually all of the evidence would have been oral testimony uncorroborated

[1]P.F. Three Partners argued in its objection to the settlement that Mr. Ferguson was in default under the court's scheduling order (he did not file a trial brief or lists of his exhibits and witnesses) and the trial should have gone forward. Mr. Ferguson likely did not file these documents because he had settled the dispute. The settlement agreement is dated August 29, 2003, also the due date for the trial brief and lists. Further, disallowance of a claim due to a procedural default by a pro se party would be a particularly likely candidate for reconsideration.

by contemporaneous documents. Further, every dispute in this chapter 11 case has proven far more difficult and expensive to resolve than necessary, largely as a consequence of Mr. Ellis' conduct (often in concert with P.F. Three Partners). The amount of the settlement is commensurate with the complexity, expense, and delay which the parties would have faced absent a settlement.

Interests and views of creditors. The Trustee gave notice of the proposed settlement to all creditors and parties in interest. No creditor other than P.F. Three Partners persisted in objecting to the settlement. It is significant that Mr. Ellis, whom P.F. Three Partners says is "the **only** individual with personal, first-hand knowledge of the affairs of the debtor before the bankruptcy was filed, the period that [sic] Ferguson claims his services were rendered," eventually withdrew his objection to the settlement. The creditors thus overwhelmingly favored the settlement.

P.F. Three Partners argues that the settlement with Mr. Ferguson amounts to "a commission for having filed this involuntary bankruptcy case and nothing more." This statement is true only to the limited extent that, under the settlement, Mr. Ferguson is releasing all claims against the estate, which must include claims under 11 U.S.C. § 503(b)(3)(A) (granting involuntary petitioners an administrative expense claim for their actual, reasonable expenses). The record

amply establishes that, considering all relevant factors, the proposed settlement is well within the range of reasonableness. The motion for reconsideration lacks any reasonable basis in fact or law. A separate order denying the motion will be entered.

DATED: Honolulu, Hawaii, January 8, 2004.

/s/ Robert J. Faris
United States Bankruptcy Judge